

April 6, 2016

The Honorable Bill Walker  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, AK 99811-0001

Re: Interpretation of AS 42.05.711(r)

Dear Governor Walker:

You requested an opinion on whether the exemption from regulation by the Regulatory Commission of Alaska (“RCA”) provided for in AS 42.05.711(r) applies to an expansion of a plant or facility that qualified for the exemption, if the expansion occurs after January 1, 2016. A plain reading of the statute is ambiguous. But applying the rules of statutory construction, I am of the opinion a court addressing the issue will find that the exemption applies to a qualifying plant or facility that expands after January 1, 2016, as long as the plant or facility continues to meet the other eligibility requirements.

**I. Alaska Statute 42.05.711(r) creates an exemption from regulation by the Regulatory Commission of Alaska.**

The Alaska Public Utilities Regulatory Act (“the Act”) allows for RCA to, among other things, “regulate every public utility engaged or proposing to engage in a utility business inside the state.”<sup>1</sup> A “public utility” includes every corporation, company, individual, or association that operates, manages, or controls a plant or facility that furnishes, by generation, transmission, or distribution, electrical service to the public for

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<sup>1</sup> AS 42.05.141(a)(1).

compensation.<sup>2</sup> Alaska Statute 42.05.711 exempts from regulation certain public utilities.<sup>3</sup> You asked me to review the exemption provided for in AS 42.05.711(r).

Alaska Statute 42.05.711(r), in pertinent part, provides:

A plant or facility that generates electricity entirely from renewable energy resources is exempt from regulation under [the Act] if

- (1) the plant or facility
  - (A) is first placed into commercial operation on or after August 31, 2010, and before January 1, 2016; and
  - (B) does not generate more than 65 megawatts of electricity

Your question assumes that the plant or facility met these requirements—and the other requirements of the exemption—prior to expansion. Expansion will occur after January 1, 2016, and therefore commercial operation of the expanded plant or facility will first occur after expiration of the sunset provision. Whether the expanded plant will remain unregulated depends on what is meant by “plant or facility” and the phrase “first placed into commercial operation.”

## **II. Alaska courts will likely conclude that AS 42.05.711(r) applies to a qualifying plant or facility that expands after January 1, 2016.**

An Alaska court will interpret the statute “according to reason, practicality, and common sense, considering the meaning of its language, its legislative history, and its purpose.”<sup>4</sup> “The goal of statutory construction is to give effect to the legislature’s intent, with due regard for the meaning the statutory language conveys to others.”<sup>5</sup> A court may also rely on the canons of statutory interpretation to aid in its effort to interpret a statute.<sup>6</sup> One such canon is the rule of strict construction.<sup>7</sup> It requires the legislature to provide

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<sup>2</sup> AS 42.05.990(6)(A).

<sup>3</sup> See also 42.05.141(a)(1) (providing authority to RCA to regulate every “public utility . . . except to the extent exempted by AS 42.05.711”).

<sup>4</sup> *Wilson v. State, Dep’t of Corrs.*, 127 P.3d 826, 829 (Alaska 2006).

<sup>5</sup> *Id.* (quoting *Nat’l Bank of Alaska v. Ketzler*, 71 P.3d 333, 334 (Alaska 2003) (internal quotes omitted)).

<sup>6</sup> *State, Dep’t of Commerce, Cmty. & Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 597 (Alaska 2011).

<sup>7</sup> *McKee v. Evans*, 490 P.2d 1226, 1230 n.18 (Alaska 1971); see also *Harmon v. N. Pac. Union Conference Ass’n of Seventh Day Adventists*, 462 P.2d 432, 438-39 (Alaska 1969) (“If the legislature desires a broader form of exemption, it may amend the statute. Under the policy of strict construction of such statutes we cannot, under the existing

clear intent when it wishes to create an exemption and places the burden on the claimant to show that the rule applies.<sup>8</sup> Even when applying the rule of strict construction, the interpretation must be reasonable.<sup>9</sup>

**A. The plain language of AS 42.05.711(r) is ambiguous.**

The terms “plant or facility” and the phrase “placed into commercial operation” are not defined. The statute provides no guidance as to whether the entire “plant or facility” needs to be in operation prior to 2016 or just a portion. The ambiguity becomes more pronounced when an expansion of the plant or facility has occurred after January 1, 2016. A court will assume that every word and phrase in the statute must be given effect.<sup>10</sup> The sunset provision must have some meaning; the question therefore is whether a court would apply the provision only to entirely new construction, or whether it would also apply it to the expansion of a plant or facilities placed into operation after 2016. Whether applying the sunset provision to expansions is reasonable depends on legislative intent, the purpose of the exemption, and how the exemption is read as a whole.

**B. Legislative history suggests the exemption was meant to encourage renewable energy generation with the sunset provision serving as a means to protect consumers.**

During committee hearings on the bill in both the Senate and the House, legislators expressed their desire to reduce the cost of regulation as a means of encouraging development of renewable energy resources. Based on a research report from the Legislative Research Services,<sup>11</sup> the bill’s sponsors represented that other states do not regulate independent power producers (“IPP”), of which renewable resource generators were considered a subset.<sup>12</sup> By contrast, existing Alaska law defines many IPPs as public utilities, with attendant regulatory oversight.<sup>13</sup> Based on testimony from at

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statutory language, extend the statute to cover those objects not plainly within its meaning.”).

<sup>8</sup> *McKee*, 490 P.2d at 1230 n.18.

<sup>9</sup> *Id.*

<sup>10</sup> *Romann v. State, Dep’t of Transp. and Pub. Facilities*, 991 P.2d 186, 190 (Alaska 1999).

<sup>11</sup> Tim Spengler, Legislative Analyst, *Regulation of Wholesale Transactions by Independent Power Producers*, Rep. No. 10.189 (March 5, 2010). All documents relied on to analyze the legislative history of S.B. 277, 26th Legislature, are available online at [www.legis.state.ak.us](http://www.legis.state.ak.us).

<sup>12</sup> Committee Minutes, Senate Judiciary (Mar 22, 2010) (testimony of Alaska State Senator Lesil McGuire).

<sup>13</sup> *See* AS 42.05.990(6).

least one potential renewable resource generator, the bill's sponsors concluded that Alaska's regulatory environment could impede renewable energy electricity generation in Alaska.<sup>14</sup>

The initial version of the bill did not include the sunset provision or the 65 megawatt limit on the amount of electricity generated.<sup>15</sup> These provisions were added via committee substitute after some legislators expressed concern that the exemption from regulation might compromise consumer protection.<sup>16</sup> The amendment appeared to alleviate those concerns as Senator Wielechowski noted that, while "IPPs shouldn't be in a position to dominate the market, the 65 megawatt limitation and the sunset provides protection for consumers."<sup>17</sup> The sunset provision serves the purpose of consumer protection by (1) limiting the number of plants or facilities that qualify for the exemption; and (2) providing the legislature with the ability to assess the impact of the exemption prior to deciding whether to let it expire.<sup>18</sup>

**C. A court will likely conclude that applying the exemption to a qualifying plant or facility that expands after 2016 is the more reasonable interpretation.**

Based just upon the plain language of the provision a court might or might not conclude that the exemption does not apply to a qualifying plant's or facility's expansion when that expansion was first put into operation after January 1, 2016. However, an interpretation that it does not apply appears unreasonable because it creates more ambiguity and potentially undermines the overall purpose of the exemption. Additional questions would arise as to whether the original plant or facility continued to qualify for

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<sup>14</sup> See Letter from Margie Brown, President and CEO of Cook Inlet Region, Inc., to the Honorable Mike Chenault (April 13, 2010).

<sup>15</sup> See S.B. 277, 26th Leg. Sess., 26-LS1353/E; see also AS 42.05.711(r)(1)(A) & (B).

<sup>16</sup> See CS for S.B. 277(RES), 26th Leg. Sess., 26-LS1353\P.A; see also Committee Minutes, Senate Resources (Feb 22, 2010) (Co-Chair Wielechowski asking whether "the public's interest could be adequately protected under this bill through the process of exempting IPPs from regulation"); Committee Minutes, Senate Resources (Feb 25, 2010) (noting that these changes were to respond to concerns about the size of facilities exempted).

<sup>17</sup> Committee Minutes, Senate Judiciary (Mar 24, 2010).

<sup>18</sup> See *MED Trends, Inc. v. United States*, 102 Fed. Cl. 1, 6 (2011) (stating the purpose of the sunset provision was to allow "Congress the opportunity to assess the impact of the [high-value] protests on [the] Federal procurement system before deciding whether to extend, or let expire, the authority" (alterations in original) (internal quotation marks omitted)).

the exemption in light of the expansion. If the exemption continued to apply, the original portion of the plant or facility would operate unregulated with RCA regulating only the expansion.

Further, a reading of the exemption that disqualifies a previously exempt plant or facility because that plant or facility expanded after January 1, 2016, undermines the purpose of the statute. As discussed above, this exemption was meant to encourage development of, and investment into, renewable energy generation in Alaska. A successful plant or facility that otherwise qualifies for the exemption may be discouraged from expansion if the consequences of expansion result in the plant or facility incurring the cost of regulation in the future.

A more reasonable interpretation of the statute exempts the entire plant or facility—including the expansion—as long as the plant or facility continues to meet the other requirements of the statute. Under this interpretation, the sunset provision still has meaning as the plant or facility must nevertheless meet the requirement of being placed into commercial operation prior to 2016. Additionally, the purpose of the sunset provision—consumer protection—continues to be fulfilled. The number of unregulated plants or facilities remains controlled as RCA would regulate any new facilities generating renewable energy for the first time after January 1, 2016. Additionally, unregulated plants or facilities would not dominate the market as they are still subject to the 65 megawatt limit.<sup>19</sup> If the expansion caused the plant or facility to generate more than 65 megawatts of electricity then it would no longer qualify for the exemption and would be subject to regulation.

## CONCLUSION

The plain language of AS 42.05.711(r) is ambiguous because it is not clear whether the exemption requires the entire plant or facility to be placed into commercial operation prior to January 1, 2016. After considering the rules of statutory interpretation, the legislative history, and the purpose of the exemption, it is my opinion that continuing to apply the exemption to an otherwise qualified plant or facility that expands after the date of the sunset provision is the more reasonable interpretation. It fulfills the original purpose of the legislation by encouraging additional investment into the generation of renewable energy in Alaska while ensuring consumer protection by limiting the number of unregulated facilities to only those that first began commercial operation between August 31, 2010 and January 1, 2016, and exempting only those plants or facilities that

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<sup>19</sup> See AS 42.05.711(r)(1)(B). If an expansion of the plant or facility relates back to when the plant or facility was first placed into commercial operation, then the plant or facility's entire electrical output—including that produced by the expansion—will count towards the 65 megawatt limit.

produce less than 65 megawatts of electricity. And it avoids the additional ambiguity of requiring RCA to regulate the expansion of a plant or facility while the original plant or facility remains unregulated.

Please contact us if you would like further advice on this matter.

Sincerely,

Craig W. Richards  
Attorney General